MOTION TO DISMISS OR AFFIRM

NOW comes Frank J. Kelley, as Attorney General of the State of Michigan, by Robert A. Derengoski, Solicitor General, and Stewart H. Freeman, Assistant Solicitor General, to respectfully move that this Honorable Court dismiss this appeal or alternatively that the Advisory Opinion below be affirmed.

A brief in support of this motion is appended hereto. Simply stated, the Attorney General contends that an amicus curiae may not appeal to this Court from an advisory opinion of a State supreme court particularly where proceedings involving the assailed statute are still pending in the State court.

Wherefore, it is prayed that the appeal be dismissed or, alternatively, that the Advisory Opinion below be affirmed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stewart H. Freeman,
Assistant Solicitor General

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In The

SUPREME COURT OF THE UNITED STATES

No. 1056

October Term, 1970

ADVISORY OPINION re CONSTITUTIONALITY OF PA 1970, NO. 100

Appeal From The Supreme Court Of The State of Michigan by Harold L. Smith, Amicus Curiae

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BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

COUNTERSTATEMENT OF QUESTION PRESENTED

May an amicus curiae "appeal" to this court from an Advisory Opinion of the Supreme Court of the State of Michigan, particularly where proceedings involving the assailed statute are still pending in the state court?

The Attorney General of Michigan contends that the answer is "NO."

COUNTERSTATEMENT OF THE CASE

Act 100 of the Michigan Public Acts of 1970, commonly known as the State School Aid Bill, was signed into law by the Governor of Michigan on July 20, 1970. By House Concurrent Resolution No. 435, and pursuant to Article 3, Section 8, of the 1963 Michigan Constitution, the State legislature requested the State Supreme Court to pass upon the constitutionality of this act.

Harold R. Smith, an attorney of the State of Michigan, was granted permission by the Michigan Supreme Court to enter the Advisory Opinion matter as amicus curiae. Mr. Smith thereupon filed a one page brief citing one unpublished decision. (1b). In this Court, Mr. Smith designates himself as the "appellant" and names certain of the other amici curiae as "appellees."

Thereafter, in October of 1970, the Supreme Court of Michigan rendered its Advisory Opinion as to Act 100. See, *Advisory Opinion re Constitutionality of PA 1970, No. 100* (1970), 384 Mich 82.

Then, at the general election of November 3, 1970, the People adopted "Proposal C" which purported to amend the 1963 Michigan Constitution by adding the following language:

> "Article 8, Section 2. No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary

school. No payment, credit, tax benefit, exemption or deduction, tuition voucher, subsidy, grant or loan of public moneys or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school."

On December 7, 1970, in response to an Executive Message from the Honorable William Milliken, Governor of Michigan, the Supreme Court of Michigan ordered a declaratory judgment action then pending in the Circuit Court of Grand Traverse County, Michigan, certified to the Supreme Court. (2b).

On December 17, 1970, by a series of special orders the Supreme Court of Michigan took full jurisdiction of the entire controversy and ordered *inter alia*:

"IT IS FURTHER ORDERED that pending final disposition of this cause, and until further order of this Court, the defendant Superintendent of Public Instruction shall be enjoined and restrained from disbursing any public funds pursuant to the provisions of Chapter 2 of Act 100 of the Public Acts of 1970." (6b).

Other orders issued that same day directed that briefs be submitted by December 30, 1970, and that oral argument on the entire controversy be held before the Supreme Court of Michigan on January 5, 1971. (7b).

ARGUMENT

An amicus curiae may not "appeal" to this court from an Advisory Opinion of the Supreme Court of Michigan, particularly where proceedings involving the annulled statute are still pending in the state court.

I.

PETITIONER HAS NO STANDING TO APPEAL

One "who is not a party to a record and judgment is not entitled to appeal therefrom." *Ex parte Leaf Tobacco Board of Trade* (1911), 222 US 579, at 581; *Ex parte Cockroft* (1881), 104 US 578; *Indiana v. Liverpool, London & Globe Ins. Co.* (1883), 109 US 168; *Bayard v. Lombard* (1850), 9 How. 530. Thus, an amicus curiae in the court below has no standing to file an appeal to this Honorable Court. *Ex parte Cutting* (1876), 94 US 14, at 20-22; *United Auto Workers v. Scofield* (1965), 382 US 205, at 209.

Furthermore, the petitioner in this Court did not make specific and plain in the State court any contention that the application of this statute would be void under Federal law. Even viewing the decision below as a "final" order amounting to a validation of a State statute, *this* petitioner has no standing to appeal to *this* Court. His entire brief in the Michigan Supreme Court (consisting of a one-page-one citation argument) is directed at the proposition that a "similar" statute was "adjudicated unconstitutional" by a Federal court. (1b). Nowhere in his brief did the petitioner assail this *Michigan* statute as repugnant to a Federal constitutional provision, law or treaty. Thus, *this*

petitioner has no standing under Title 28 USC §1257 to appeal to this Court since he did not "draw in question" on Federal grounds the statute which he here assails. See, *Hanson v. Denckla* (1958), 357 US 235, at 244; *Mergenthaler Linotype Co. v. Davis* (1919), 251 US 256, at 259.

II.

This "appeal" presents no final judgment or decree for this court to review.

By its terms, Article III, Section 2, of the Constitution of the United States extends the judicial power only to "cases" or "controversies." And, Title 28, USC §1257 allows appeals to this Court only from "final judgments and decrees."

The matter at bar is neither case nor controversy and on the Constitutionality of the assailed statute is neither a final judgment nor decree. At bar, rather, is an "appeal" from an Advisory Opinion. Thus, there is no true case or controversy here presented.

Moreover, as indicated by the Michigan Supreme Court's orders of December 17, 1970 (6b-9b), this matter is still very much in litigation. The very statute here assailed may not be enforced "pending final disposition" of a still pending cause (6b), and the entire matter is to be submitted to the Supreme Court of Michigan on January 5, 1971. Thus, this "appeal" is not from the "final word of a final court." *Market Street R. Co. v. Railroad Commission* (1944), 324 US 548, at 551. As stated in *Department of Banking v. Pink* (1942), 317 US 264, at 268:

"... the test ... [is] whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court ..."

III.

No review by this court is presently necessary since the entire matter may be disposed of on adequate non-federal grounds.

There appears to be no authority, Constitutional or statutory, which would permit this Court to review the judgment of a State court of last resort declaring a State statute to be repugnant to the *State's* constitution. If, therefore, the Supreme Court of Michigan should, in the proceedings scheduled for January 5, 1971, determine that "Proposal C" effectively amended the Michigan Constitution, and if the Michigan Supreme Court should then find that Act 100 is in conflict with Proposal C—a most likely prospect given the express language of Proposal C—there would be no issue left for this Court to review. There is nothing in this record to indicate the desirability or the necessity for *anticipatory* review of the final judgment in this matter.

IV.

If, however, the matter is properly before this court, then the Advisory Opinion below should be affirmed.

Assuming arguendo that an amicus curiae may appeal from a non-final non-adjudicatory Advisory Opinion, then we contend that, for the reasons so well-stated by Mr.

Justice Kavanagh in his opinion for the Supreme Court of Michigan, Act 100 of the Michigan Public Acts of 1970 is not in conflict with Federal law. Accordingly, the Advisory Opinion below should be affirmed.

CONCLUSION

For the aforegoing reasons, Frank J. Kelley, Attorney General of Michigan, contends that this appeal is not within the jurisdiction of this Honorable Court, but that if it is, then the Advisory Opinion below should be affirmed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stewart H. Freeman,
Assistant Solicitor General

The Seven Story Office Building
525 W. Ottawa Street
Lansing, Michigan 48913

Dated:

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STATE OF MICHIGAN

IN THE SUPREME COURT

In the Matter of the Legislature's Request for an opinion on the constitutionality of Chapter 2 of Enrolled Senate Bill No. 1082

No. 52933

BRIEF OF HAROLD R. SMITH

The State of Rhode Island recently passed a statute containing provisions similar to those of Chapter 2 of Enrolled Senate Bill No. 1082 of 1970. The Statute, on June 15, 1970, was adjudicated unconstitutional under Chapter 1 of Amendments to the Constitution of the United States, by a three-judge federal court, in Di Grazia v. Robinson. The opinion is so recent that it may be found in the July 14, 1970 issue of the United States Law Week, 39 LW 2023.

The constitutionality of Chapter 2 of said Michigan Statute, under the Michigan State Constitution, is not considered in this brief for the reason that the subject will be covered in briefs of various amici curiae.

Respectfully submitted,

HAROLD R. SMITH
225 Merriweather
Grosse Pointe Farms, Michigan
48236

Dated: August 14, 1970

RECEIVED
AUG 17 1970

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 7th day of December in the year of our Lord one thousand nine hundred and seventy.

MR 7-273

Present the Honorable-

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
KELLY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

EXECUTIVE MESSAGE OF GOVERNOR RE CERTIFICATION OF QUESTIONS PERTAINING TO PROPOSAL C — 53144

The Governor having on December 4, 1970, addressed an Executive Message to the Supreme Court with respect to the entitled cause, representing to the Supreme Court that the Circuit Court of Grand Traverse County has pending before it controlling questions of public law involved in the entitled case or controversy, and such questions are of such public moment as to require early determination,

NOW, THEREFORE, the Supreme Court does order and authorize the Circuit Court for Grand Traverse County to certify such questions contained in the Executive Message to the Supreme Court, a copy of which is attached hereto, with a statement of facts relative thereto, sufficient to make clear the application of such questions:

"And, it is further Ordered that further proceedings relative to such case are hereby stayed pending receipt of the certification of the trial court:

"And, it is further Ordered that in addition to the questions referenced in the Executive Message, the trial court shall certify the following question to the Supreme Court as a controlling question of public law involved in the pending case: "Was proposal C purporting to amend Article VIII, Section 2 of the Michigan Constitution of 1963, properly submitted to the electorate at the November 3, 1970, General Election, in conformity with Article XII, Section 2 of the 1963 Constitution, so as to constitute a valid amendment to the Constitution?"

STATE OF MICHIGAN—ss.

I, Donald F. Watson, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Watson
Deputy Clerk

[redacted]

[redacted]

December 4, 1970

The Honorable Chief Justice and Associate Justices of the Supreme Court:

William C. Milliken, Governor of the State of Michigan, pursuant to rule 787 of the General Court Rules of 1963, appears before this Court and respectfully states as follows.

There is presently pending in the Circuit Court for the County of Grand Traverse, State of Michigan, the case of THE SCHOOL DISTRICT OF THE CITY OF TRAVERSE CITY vs. FRANK J. KELLEY, ATTORNEY GENERAL, STATE BOARD OF EDUCATION, AND JOHN W. PORTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, AND ST. FRANCIS SCHOOL, ET AL., Civil Action No. 2356.

This matter seeks declaratory relief as well as judicial interpretation of an amendment to Article 8, Section 2 of the Michigan Constitution of 1963, which amendment was adopted by the people at the general election held November 3, 1970. The amendment reads:

> "Article 8, Section 2. No public moneys or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivisions or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deduction, tuition voucher, subsidy, grant or loan of public moneys or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school."

Absent judicial intervention, pursuant to the provisions of Article 12, Section 2, Paragraph 4 of the Michigan Constitution of 1963, this amendment (hereinafter referred to as "Proposal 'C'") will become effective at the end of 45 days after the general election, viz., December 19, 1970.

Since the institution of the instant litigation on November 12, 1970, the Attorney General, on December 10, 1970, filed, on behalf of all initial parties-defendant (hereinafter referred to as "defendants"), "DEFENDANTS' ANSWER,

[illegible] DEFENSE AND COUNTERCLAIMS FOR DECLARATORY RELIEF." Subsequently, on December 1, 1970, the Court permitted joinder of St. Pancratz School, et al., as intervenor defendants (hereinafter referred to as "intervenors") and said intervenors filed, under date of December 28, 1970, their "Answer-Claim and Cross-Claim" to the action in chief.

This matter now raises controlling questions of public law which are of such public moment as to require early determination. Dependent upon the resolution of these questions is the immediate administration and operation of the entire elementary and secondary educational program and structure, public and nonpublic, of the State of Michigan.

Accordingly, in view of the magnitude and urgency of this matter, I respectfully submit the following suggested questions for, upon certification by the Circuit Court, this Court's immediate consideration and determination. In all instances these questions are raised as to both the express terms and operative effect of Proposal C:

1. Does Proposal C preclude the provision, through shared time or dual enrollment programs, of elementary or secondary instruction or educational services to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students?

2. Does Proposal C preclude the provision of auxiliary services (as defined in Section 622 of Act 269, P.A. 1955, being Section 1 of Act 343, P.A. 1965, being Section 340.622 of the Compiled Laws of 1948) to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students?

3. Does Proposal C preclude use of federal moneys, made available to the State of Michigan through Title I of the Elementary and Secondary Education Act of 1965, being 20 USC, Section 241a. et seq for the purpose of providing elementary or secondary instruction or educational services to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students?

4. Does Proposal C preclude direct or indirect assistance to private institutions providing educational services to children who are placed there pursuant to court order?

5. Does Proposal C deny to intervenors and their respective represented class or classes, any tax exemption, including but not limited to any exemption or exemptions from property, income, sales, use, franchise, intangibles, inheritance, "in lieu of", or any other tax or taxes, allowed them, pursuant to the Constitution and laws of the State of Michigan, prior to the adoption of Proposal C?

6. Does Proposal C deny to intervenors and their respective represented class or classes due process of law or equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States?

7. Does Proposal C deny to intervenors and their respective represented class or classes the right to free exercise of religion and other enumerated rights guaranteed by the 1st Amendment to the Constitution of the United States as made applicable to the State of Michigan through the 14th Amendment to the Constitution of the United States?

I submit that the foregoing questions raised by the above entitled action are controlling questions of public law and are of such public moment as to require early determination. Accordingly, I urge that this Court, pursuant to rule 797 of the General Court Rules of 1963, exercise its discretion in authorizing and directing the Circuit Court for the County of Grand Traverse to certify to this Court the above stated questions, and such other questions as this Court may deem necessary and proper.

Respectfully submitted,

William G. Milliken

William G. Milliken, Governor

December 4, 1970
Date

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable

THOMAS E. KAVANAGH,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

The School District of
the City of Traverse City,
Plaintiff

vs 53144

The Attorney General, et al.,
Defendants,

and

St. Francis School, et al.,
Intervenor-Defendants

Upon due consideration of Intervenor-Defendants' "Motion for Preliminary Injunctive Order",

IT IS ORDERED that, pending final disposition of this cause, and until the further order of this Court, the Defendant Superintendent of Public Instruction shall be enjoined and restrained from disbursing any funds pursuant to the provisions of Chapter 2 of Act 100 of the Public Acts of 1970.

IT IS FURTHER ORDERED that pending final disposition of this cause, and until further order of this Court, the Plaintiff school board, and the Defendant State Board of Education shall be enjoined and restrained from discontinuing, suspending or otherwise interfering with:

1. shared time or dual enrollment programs

2. auxiliary services as defined in Sec. 622 of Act 269, PA 1955, being section 1 of Act 343, PA 1965, being section 340.622 CL 1948

3. the disbursement of federal moneys made available to the State of Michigan pursuant to Title I of the Elementary and Secondary Education Act of 1965 being 20 U.S.C. section 241a et. seq.

4. any payments now being made or hereafter ordered or required to be paid pursuant to or by reason of any order of any court having jurisdiction of any child or children.

5. any tax exemption, including those from real and personal property, income, sales, use, franchise, intangibles, inheritance, "in lieu of" or any other tax exemption allowed to intervenor-defendants or any of them.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy

Present the Honorable

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
BODMAN P. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

The School District of the City of Traverse City,
Plaintiff

vs 53144

The Attorney General, et al.,
Defendants

and

St. Francis School, et al.,
Intervenor-Defendants

Upon due consideration of the importance of the issues raised herein, and the need for prompt resolution of the controlling questions of public law certified for submission herein;

IT IS ORDERED that oral argument in this case be scheduled for the opening of Court of Tuesday, January 5, 1971.

IT IS FURTHER ORDERED that 15 copies of typewritten briefs of all parties, and the briefs of amici curiae be submitted and filed not later than 12 o'clock noon on Wednesday, December 30, 1970.

IT IS FURTHER ORDERED that printed briefs be filed as soon thereafter as possible according to rule.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy

Present the Honorable

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

Kenneth W. Garman, et al.,
Plaintiffs

vs 53025

Secretary of State, et al.,
Defendants

Plaintiff's petition for hearing and consolidation with cause #53144 is considered and treated as a motion for reconsideration of this Court's order in Garman vs Secretary of State, Docket #53025, 384 Mich 751, and so considered,

IT IS ORDERED that the motion for reconsideration be and the same is hereby GRANTED. Upon such reconsideration the application of the Defendant in Garman vs Secretary of State, Docket #53025 for Leave to Appeal from the Decision of the Court of Appeals dated September 2, 1970 is GRANTED.

Plaintiff's petition for consolidation with cause #53144 is DENIED.

STATE OF MICHIGAN—ss

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of December in the year of our Lord one thousand nine hundred and seventy

Donald F. Winters
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable

THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

Kenneth M. Garman, et al.,
Plaintiffs

vs 53827

Secretary of State, et al.,
Defendants

Upon due consideration of the relationship between this cause and Docket #51144,

IT IS ORDERED that oral argument in this cause be scheduled for the opening of Court on Tuesday, January 5, 1971.

IT IS FURTHER ORDERED that 15 copies of typewritten briefs of all parties, and the briefs of amici curiae be submitted and filed not later than 12 o'clock noon on Wednesday, December 30, 1970.

IT IS FURTHER ORDERED that printed briefs be filed as soon thereafter as possible according to rule.

STATE OF MICHIGAN—ss

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom; and the whole of said original now

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 17th day of December in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters
Clerk